

Black Lung Benefits Improvement Act of 2014

Section-by-Section Summary

November 20, 2014

TITLE I – BLACK LUNG BENEFITS

Part A – Improvement in the Process of Filing and Adjudicating Claims for Benefits

Section 101. Mandatory Disclosure of Medical Information and Reports.--This section promotes the fair adjudication of claims under the Black Lung Benefits Act (“the Act”) and safeguards the health and well-being of coal miners, by providing coal miners, surviving spouses, dependents, and coal operators with full access to medical information relating to a miners’ Black Lung claim. If a coal operator requires a miner to submit to a medical examination, this section entitles the coal miner to receive a complete copy of the physician’s report within 30 days, including the physician’s diagnoses, conclusions, and the results of any tests performed on the miner. This section also requires each party to provide all other parties in the proceeding with a copy of medical information concerning the miner’s physical condition, regardless of whether the party intends to submit that information as evidence in the proceeding. The medical information that must be disclosed shall include the opinion of any examining physician, any examining or non-examining physician’s interpretations of radiographs or pathology. This section is necessary to resolve issues surrounding revelations that coal operators and their attorneys withheld evidence of black lung disease from miners, survivors, judges, and even other physicians that coal operators had hired to testify in these cases.

Section 102. Legal Fees.--Recognizing the well-documented legal and medical complexities miners face when pursuing claims under the Act, as well as the difficulties they face in securing legal representation, this section establishes a program to provide miners’ attorneys with legal fees of up to \$1,500 at three different stages in the litigation process, for a total of up to \$4,500. The fees under this program would initially be paid from the Black Lung Disability Trust Fund; however, if the miner prevails in his or her claim for benefits, the responsible coal operator would be required to reimburse the Trust Fund for the fees that were paid under this section and, consistent with existing law, would be required to pay any additional attorneys’ fees that exceed the amount that had already been paid from the Trust Fund. Current law prohibits coal miners’ attorneys from receiving any fees for their representation of coal miners until the case has become final, and only if the miner prevails. This process often takes several years, and as long as a decade, and is a financial disincentive for attorneys to represent coal miners in these cases. In Fiscal Year 2013, only 25 percent of miners were represented by attorneys when filing their claims with the District Directors, while another 20 percent were represented by non-attorney laypersons – leaving 55 percent of all claimants without any representation at all.

Sec. 103. Clarifying eligibility for black lung benefits.—The Black Lung Benefits Act establishes an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis in cases where the miner has been diagnosed with progressive massive fibrosis or complicated pneumoconiosis. However, the circuit courts have split on what a claimant must prove when relying on biopsy or autopsy evidence to invoke the presumption. In the Fourth Circuit, the

claimant must show that any pathology evidence of massive lesions, if X-rayed, would appear as large opacities sufficient to prove complicated pneumoconiosis. The Tenth and Eleventh Circuits have rejected this equivalency requirement and held that pathology evidence of massive lesions, standing alone, is sufficient to invoke the presumption. This section simplifies the presumption, add the terms “complicated pneumoconiosis” and “progressive massive fibrosis” to more clearly define the disease that will invoke the presumption, and eliminate any language that would give rise to an equivalency requirement. It also substitutes the term “radiograph” for the outmoded term “roentgenogram.”

The Black Lung Benefits Act, as amended by Section 1556 of the Affordable Care Act (commonly referred to as the “Byrd Amendments”), restored the 15-year presumption of total disability or death caused by pneumoconiosis for coal miners who worked for at least 15 years underground (or comparable surface) mining and who suffer or suffered from a totally disabling respiratory impairment. This section would provide clarity to the Byrd Amendments by (1) making it clear that the presumption equally available to surface and underground coal miners; (2) making the rebuttal methods equally applicable to all liable parties; and (3) establish a clear rebuttal standard (*i.e.*, in “no part”) when the liable party seeks to rebut by severing the presumed causal connection between the miner’s disability and coal mine employment. Although OWCP’s current regulations resolve the latter two issues, coal mine operators continue to raise them in litigation.

Section 104. Restoring Adequate Benefit Adjustments for Miners Suffering from Black Lung Disease and for Their Dependent Family Members.--This section restores cost-of-living adjustments for Black Lung beneficiaries that were blocked or reduced as a result of federal employee pay freezes in 2011, 2012, 2013, and 2014. This section also ensures that future payments to individuals receiving benefits under the Act will keep pace with the increasing cost of living using the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-U). Under the Act, basic benefit payments are equal to 37 ½ percent of the monthly rate of pay for federal employees in grade GS-2, step 1, with additional payments provided to claimants with one or more dependants.

Because these benefit payments are tied to the pay rate for federal employees, when Congress blocks cost-of-living adjustments for federal employees in a given year, beneficiaries similarly do not receive increases in their benefit payments that year. As a result, coal miners, surviving spouses, and dependents were deprived of cost-of-living adjustments of 0.9% in 2011, 1.1% in 2012, 1.2% in 2013, and a partial adjustment of 0.3% in 2014 (the adjustment in 2014 should have been 1.3%, but only 1.0% was provided). A 1.3% adjustment is expected for 2015, but it is not yet clear whether that adjustment will be approved.

Had beneficiaries received each of these cost of living adjustments, their annual benefit payments would be equal to \$7,951 per year in 2015, as opposed to the current rate of \$7,581 in 2014, a difference of nearly \$400. To remedy this problem, this section sets the annual rate of benefit payments for Black Lung claimants at \$7,980, or \$665 per month, beginning in 2015. After 2015, this section ties yearly increases in benefit payments to the Consumer Price Index for Elderly Consumers, so that benefits for will increase according to an appropriate measure of their

actual cost of living and cannot be frozen if Congress blocks cost-of-living adjustments for federal employees in future years.

Section 105. Treatment of Evidence in Equipoise.--This section reinstitutes a longstanding legal doctrine applied in Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act claims known as the "true doubt" rule. The rule functions as an evidentiary tie-breaker, whereby a fact-finder who determines the evidence to be evenly balanced on an issue would resolve the issue in the claimant's favor. The "true doubt" rule was previously adopted as a regulation promulgated by the Department of Labor until it was invalidated in 1994 by the Supreme Court in a 6-3 decision in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*. The Court did not invalidate the policy underlying the rule, but instead found that the regulation conflicted with the Administrative Procedure Act's (APA) assignment of burden of proof (i.e., an administrative regulation could not contradict a statute). The statutory reinstatement of the "true doubt" rule, as provided for in this section, does not conflict with the Supreme Court's ruling or the APA because a specific statutory burden of proof provision under the Black Lung Benefits Act would trump the APA's general burden of proof requirements.

Section 106. Providing Assistance with Claims for Miners and their Dependent Family Members.--This section improves the claims process under the Act by authorizing black lung clinics to use a portion of their federal grant funding to assist miners, surviving spouses, and dependents as they pursue claims for benefits. This assistance would be provided in addition to the clinics' existing role of treating respiratory and pulmonary impairments in active and inactive coal miners.

Section 107. False Statements or Misrepresentations, Attorney Disqualification, and Discovery Sanctions.--This section strengthens criminal penalties for anyone knowingly and willfully making false statements or misrepresentations, provides guidelines for making determinations as to whether attorney behavior warrants disqualification, and grants Administrative Law Judges (ALJ) the authority to issue sanctions when a party fails to comply with a discovery order. Specifically, the section makes it a felony for a claimant, operator, examining physician, or any other person to (1) knowingly and willfully make a false statement or misrepresentation, or (2) threaten, coerce, intimidate, deceive, or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in a proceeding. Any attorney found guilty of this conduct is also permanently disqualified from representing any party or appearing in any further proceedings under the Act. Current law imposes a misdemeanor penalty on persons willfully making a false statement for the purpose of obtaining a benefit or payment, but is silent with regard to persons willfully making a false statement with the purpose of preventing a claimant from receiving a benefit for which the claimant would otherwise be eligible. The Secretary of Labor is also required to promulgate regulations to provide procedures for disqualifications and discovery sanctions.

Section 108. Development of Medical Evidence by the Secretary.--This section expands the Secretary's current obligation to offer a coal miner a complete pulmonary evaluation to substantiate a claim for benefits, by further requiring the Secretary to supplement the medical evidence in cases where a party opposing the claim provides evidence that could be considered

contrary to the initial report of the pulmonary examination, or such party's evidence has been submitted to an ALJ that had not been previously considered by the Secretary in making an award. To develop the supplemental evidence, the Secretary shall request the physician who developed the initial medical report for the claimant to review any medical evidence submitted after the initial report, and to update the opinion of such physician in a supplemental report, if warranted. If the original physician who examined the miner is no longer available, the Secretary shall select another qualified physician.

This section codifies Secretary's practice of creating and maintaining a list of qualified physicians to perform pulmonary examinations of coal miners, but enhances quality assurance by requiring that the Secretary pre-screen physicians for adverse professional actions involving medical licensure, certifications, hospital privileges, or professional societies. This section precludes the use of physicians from the list maintained by the Secretary who have a potential or actual conflict of interest through current or recent employment or contractual arrangements with a private party opposing an individual's claim, unless the claimant knowingly waives such conflict. The Secretary shall update

Section 109. Establishment of a Pilot Program to Provide Impartial Classifications of Chest Radiographs.— Competing interpretations of chest radiographs are subject to dispute in claims proceedings, and some physicians routinely fail to ever diagnose complicated pneumoconiosis or progressive massive fibrosis, the most severe form of black lung disease, or exhibit a pattern of bias in their interpretations. This section requires the Director of the National Institute for Occupational Safety and Health (NIOSH) to establish a one year pilot program to provide unbiased classifications of findings in chest radiographs using certified B readers where there is a question in dispute regarding a diagnosis of complicated pneumoconiosis. In establishing the program, the Director of NIOSH shall: (1) establish criteria for the selection of B readers to be used in the program, (2) develop protocols for preparing reports, (3) establish a quality assurance program to assure accuracy and consistency, (4) develop a code of ethics, and (5) establish the rate of pay for physicians who are hired under contract to serve as B readers. Such quality assurance program shall ensure readers are blinded from the origin of the X-ray and shall utilize pre-read X-rays that are borderline positive or negative for complicated pneumoconiosis or progressive massive fibrosis in order to evaluate the accuracy with which B readers classify X-rays.

NIOSH shall establish panels of made up of three B readers, and issue panel reports within 45 days for digital chest radiographic images and 90 days for film-based chest radiographs. NIOSH shall establish a fee for preparing a B reader panel report which must be based on direct costs. Claimants, operators, or their representatives may request a B reader panel report where there is a question regarding a diagnosis of complicated pneumoconiosis. The fee for such report shall be deposited in the Black Lung Disability Trust Fund. A report may also be requested by individuals authorized by the Secretary of Labor to hear and determine claims for benefits, and no fee shall be charged.

The Director of NIOSH or a designee shall be available to respond to interrogatories or to appear and testify about the conclusion of a B reader panel report, or the process used to prepare such report. To the extent that additional information is reasonably necessary for the full development

of evidence in a case, a member of a B reader panel may be required to respond to interrogatories, if so ordered by an Administrative Law Judge. However, a panel member may not be required to appear and testify under subpoena, unless the party making the request shows that the B Reader panel is incomplete, and responses to interrogatories are unclear or incomplete, or there is an extraordinary circumstance where other additional information that is reasonably necessary for the full development of the evidence in the case cannot be provided by the Director. The General Counsel for the Department of Health and Human Services, in consultation with the Solicitor of Labor, shall represent the Director, his designee, or panel members in any claims proceeding.

The costs of establishing and operating the program shall be paid from the Fund. Interim final rules shall be issued within 180 days of enactment. NIOSH shall, in consultation with the DOL, prepare a report to Congress after the one year pilot is concluded, with recommendations on whether it should be continued, and if so, whether modifications are needed.

Section 110. Medical Evidence Training Program.--This section requires the Secretary, in coordination with NIOSH, to establish a training program within 60 days of enactment to educate Administrative Law Judges who hear and decide cases under the Act on medical evidence relevant to such cases. This shall include new developments in pulmonary medicine relating to pneumoconiosis, medical and other relevant evidence sufficient to support a claim for benefits, and weighing conflicting medical evidence and testimony. Currently-employed ALJs shall complete the training program within 60 days after the training program has been established. ALJs who are newly-assigned to hear cases under the Act after the date of enactment shall complete such training prior to hearing such cases.

Section 111. Technical and Conforming Amendments.—The “Byrd Amendments”, which were enacted as part of the Affordable Care Act, (1) restored the 15-year presumption of total disability or death caused by pneumoconiosis for coal miners who worked for at least 15 years underground mining and who suffer or suffered from a totally disabling respiratory impairment; and (2) restored surviving spouses’ and dependents’ automatic entitlement to survivor benefits if the coal miner died while receiving federal Black Lung benefits. While the Byrd Amendments clearly reinstated the 15-year presumption for miners along with an automatic entitlement to benefits for surviving spouses, several other sections of the code referencing benefits for these miners and surviving spouses were left un-amended. Consistent with the clear language and intent of the Byrd amendments, as well as decisions from circuit courts that have interpreted those provisions (Third, Fourth, Sixth, and Eleventh), this section makes technical corrections to ensure that the Byrd amendments are applied consistently throughout Act.

This section makes a series of technical amendments to render the Black Lung Benefits Act gender neutral. For example, it replaces the term “widow”, “wife” and “surviving divorced wife” with “spouse” or “surviving spouse”. It modifies current law regarding eligibility for survivor benefits to provide that marital status is determined by the courts of the state where the marriage was celebrated, rather than determining the validity of the marriage based on state of domicile.

Section 112. Readjudications for Cases Involving Certain Chest Radiographs.--This section allows claimants, including coal miners and their survivors, to file a new claim for benefits if

such claim had been denied prior to the date of enactment and such decision involved a chest radiograph that had been interpreted as negative for simple pneumoconiosis, complicated pneumoconiosis, or progressive massive fibrosis by a physician with respect to whom the Secretary of Labor has directed that such physician's medical opinions be given no weight in evaluating a claim of benefits. A new claim may be refiled within 1 year after the date of enactment.

For example, on June 2, 2014, the Secretary directed its claims examiners not to credit negative chest x-ray readings for pneumoconiosis performed by Dr. Paul S. Wheeler of Johns Hopkins University Hospital in the absence of persuasive evidence rehabilitating his negative readings. This action by the Secretary followed an October 2013 report issued by the Center for Public Integrity that indicated that since the year 2000, in more than 1,500 Black Lung claims, Dr. Wheeler had never once, in more than 3,400 x-ray readings, interpreted an x-ray as positive for complicated pneumoconiosis. In response to these reports, Johns Hopkins immediately began an internal investigation and suspended its Black Lung x-ray reading program. The Secretary of Labor stated that "Such a consistent record of never diagnosing complicated pneumoconiosis and almost never diagnosing simple pneumoconiosis undermines the credibility of his conclusions and renders them less credible than a positive reading. In addition, the reports demonstrate that Dr. Wheeler's diagnoses have been wrong many times."

Part B – Reports to Further Improve the Administration and Benefits under the Black Lung Benefits Act

Section 113. Strategy to Reduce Delays in Adjudication.--This section requires the Secretary of Labor, within 90 days, to submit to Congress a comprehensive strategy to reduce the backlog of cases pending before the Office of Administrative Law Judges (OALJ). The strategy must identify, among other things, the resources necessary to ensure that claims brought under the Black Lung Benefits Act are decided within 12 months from the date they are received by the OALJ. Since Fiscal Year 2005, the number of ALJs has dropped by 20%, from 45 to 36. Due to the shortage of ALJs and other factors, Black Lung cases on average languish for 42 months, and delays are so extreme that it takes an average of 429 days just to assign a Black Lung case to an ALJ.

Section 114. GAO Report on Black Lung Program.--Building on the findings of an October 2009 Government Accountability Office (GAO) report on administrative and structural problems in the Black Lung Benefits Program, this section requires GAO to conduct an assessment of barriers to accessing health care services that exist for miners suffering from Black Lung disease, and to make recommendations to address issues relating to patients' access to health care services. At a recent hearing held by the Senate Committee on Health, Education, Labor, and Pensions Subcommittee on Employment and Workplace Safety, one miner testified that, even after being awarded benefits, he was denied a lung transplant by the insurance company of the coal operator who was liable for providing his health care benefits under the Black Lung Benefits Act. This section also requires GAO to evaluate whether monetary benefits paid to coal miners, survivors, and dependents, as increased through this legislation, are sufficient to meet their living expenses.

TITLE II – STANDARD FOR RESPIRABLE DUST CONCENTRATION

Sec. 201. Standard for respirable dust concentration.--In April 2014, the Secretary of Labor issued a final rule to reduce miners' exposure to respirable coal mine dust and prevent new cases of Black Lung disease. Operators are required to phase in requirements for the use of continuous personal dust monitors and reductions in the maximum airborne dust concentration levels by August 1, 2016. This section requires that beginning 5 years thereafter, on August 1, 2021, the Secretary shall conduct a retrospective study of coal dust levels from samples that were collected from continuous personal dust monitors (CPDMs) to determine whether to further lower the applicable respirable dust standards in the revised rule to protect the health of miners; whether to modify the engineering controls and work practices used by mine operators to comply with the applicable standard for respirable dust concentration; and whether to increase the frequency of sampling. The Secretary of Labor is required to report its findings to Congress within one year, and to conduct a subsequent evaluation every three years thereafter.

If any of the Secretary's reports concludes that either (1) the applicable standard for respirable dust concentration should be lowered to protect the health of coal miners or (2) that the incidence of pneumoconiosis among coal miners in the United States (as monitored and reported by the National Institute for Occupational Safety and Health) has not been reduced since the implementation of the most recent applicable standard for respirable dust concentration, then the Secretary shall, consistent with existing requirements under the Mine Act, revise the standard and any applicable sampling or testing procedures within 24 months.

TITLE III – ESTABLISHING THE OFFICE OF WORKERS' COMPENSATION PROGRAMS

Sec. 301. Office of Workers' Compensation Programs. This section codifies of the Office of Workers' Compensation Programs in the Department of Labor, which shall be directed by a Director, who shall be appointed by the President by and with the advice and consent of the Senate.